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injury be repaired in damages? We are not to presume that it will not be. This would be to impugn the justice of our common-law forums without a reason. We think under the circumstances of the case that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained, or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side, and consequent injury on the other, a decree to restrain the act complained of as certainly follows as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace. Hence the chancellor will consider whether he would not do a greater injury by enjoining, than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should so appear he will refuse to enjoin: *Hilton v. Greenville*, 1 Cr. & Ph. Ch. R. 292; *Gray v. The Ohio and Pennsylvania Railroad Co.*, 1 Grant 412.

We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below; and that the decree dismissing the plaintiff's bill, with costs, must be affirmed.

Appeal dismissed at the costs of the appellant.

Supreme Court of Pennsylvania.

COMMONWEALTH EX REL. BALLIER v. THE COMMON COUNCIL
OF THE CITY OF PHILADELPHIA.

A tribunal authorized by law to decide upon the sufficiency of sureties for official duty, cannot postpone its decision because the title to the office is elsewhere disputed.

An officer not commissioned is authorized to enter upon the performance of the duties upon the certificate of election delivered by the return judges.

THIS was a proceeding for a *mandamus*, to compel the Common

Council of the city of Philadelphia to decide upon the sufficiency of sureties submitted to them by the relator.

At the general election of October 1867, John F. Ballier was returned as elected to the office of city commissioner. This office was created by § 13, Act of February 2d 1854, Pamph. L. 30. Before entering upon the performance of the duties of said office it was required that he should give bond "with such sureties as shall be approved by the councils for the faithful performance of the duties of said office:" § 4, Act of April 21st 1858, Pamph. L. 386.

The relator submitted sufficient sureties to the Common Council, but that body declined to act.

On the 5th day of February 1868, a petition was filed in the Supreme Court of Pennsylvania, on which an *alternative mandamus* was awarded as follows:—

January 1868. 367.

City and County of Philadelphia. ss.

The Commonwealth of Pennsylvania,

To George W. Mactague *et al.*, members of the Common Council of Philadelphia,
Greeting :

Whereas, John F. Ballier has filed his petition, setting forth

That at the general election in October 1867, the said John F. Ballier was duly elected by the qualified voters of the city of Philadelphia to the office of city commissioner, for a term commencing on the 1st day of January next succeeding said election, as appears by the return thereof, filed in the office of the prothonotary of the Court of Common Pleas of the county of Philadelphia, and a certificate of which election was delivered to the said John F. Ballier in accordance with law :

And that, by the fourth section of an Act of the General Assembly, approved April 21st 1858 (P. L. 386), it is enacted that a city commissioner shall, before entering upon the duties of his office, give bond in such amount and with such sureties as shall be approved by the councils of Philadelphia, for the faithful performance of the duties of said office :

And that, in pursuance to said act, the councils of Philadelphia, by an ordinance of May 10th 1858 (p. 200), ordained that the amount of the bond to be given in such case should be in the sum of \$10,000 :

And that, in pursuance to the requirements of the law as aforesaid, the said John F. Ballier submitted to the Common Council certain sureties, whose sufficiency was approved by the committee of finance in accordance with the rules of said body, but that the said Common Council refuse to consider the same, or to proceed to decide thereupon ; and that said action caused injury to the said John F. Ballier, and that he was without any specific remedy in the premises, and praying that a writ of *mandamus* should issue :

Therefore, **WE COMMAND** you and each of you, as members of the Common Council of the city of Philadelphia, to decide according to law, and the usages of said council, at a session of your body next hereafter occurring, upon the sufficiency of the sureties of the said John F. Ballier, submitted by him for the faithful per-

formance of the duties of the office of city commissioner ; or the cause wherefore to show unto us, why you should not, in answer to this writ, on Saturday, the 15th day of February 1868, and hereof fail not.

The respondents filed a return setting forth "that by a petition of fifty citizens and qualified electors filed in the Common Pleas of the county of Philadelphia on the 18th day of October 1867, in accordance with § 35 of the Act of February 2d 1854, Pamph. L. 28, complaint was made of 'a false return and undue election for the office of city commissioner,' and that the proceeding upon said petition was still pending, and that this was a sufficient excuse for a non-compliance with said writ.

To this return the relator demurred and prayed that a *peremptory mandamus* issue.

David W. Sellers and *Isaac Gerhart*, for the relator, urged that it was the duty of the defendants to proceed with the decision of the sufficiency of the sureties: *Lamb v. Lynd*, 8 Wright 336.

Where an officer is elected by the people, the summing up and certificate of the return judges determine in the first instance the title to the office. If error or fraud is alleged a judicial tribunal must determine that question in the usual way, but meanwhile the duties of the office must be performed, and by the holder of the *primâ facie* title: *Ewing v. Thompson*, 7 Wright 373.

If securities must be approved by the court, the court cannot suspend its action although at the very time the contest for the office may be progressing before it: *In re Securities*, 4 Phila. Rep. 370. *A fortiori* is the duty to be performed by a municipal body having no power to decide upon the title to the office.

James Lynd, City Solicitor, *contra*.

February 21st 1868.

PER CURIAM.—Until the title of the relator is avoided it is good against all. He is authorized to enter upon the performance of the duties of the office, and the Common Council cannot delay him, by declining to approve his sureties, if sufficient. A pending contest is nothing to this question. Let a peremptory *mandamus* issue as prayed for.